

OGC REVIEW
COMPLETED

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WAIVER v. FOREBEARANCE

Upon a failure to perform on or before the contract due date, the Government must within reasonable time elect whether to terminate for default or to permit continuance of performance. The Government is entitled to take sufficient time to determine what action will be in its best interests. At any time during this interval, the Government may elect to terminate for default without warning the original delivery schedule.

The rationale of granting the Government a reasonable period of forbearance after a specified delivery date is to permit it to investigate and determine whether it legally has the right to terminate the K for default and, if it does, to further decide whether it wishes to do so under the circumstances. The mere fact the Government has a right to T4D does not require it to do so. Sol O. Schlesinger, d/b/a Ideal Uniform Cap Co. v. U.S. 182 Ct. Cl. 571, 390 F.2d 702 (1968); DeVito v. U.S. 188 Ct. Cl. 979, 413 F.2d 1147 (1969).

The First Essential Element: Government Actions Constituting Waiver

In the absence of a clear expression of forbearance, the intent of the Government must be determined by its conduct. If the Government takes no action whatsoever to further or encourage a contractor's continued performance, such inaction can only be characterized as forbearance. DeVito v. U.S. 188 Ct. Cl. 979, 413 F.2d 1147 (1969).

Generally, however, the Government will take some action, and its intent to forbear or waive will be determined from the sum of the Government's act and surrounding circumstances. Frequently, "equity" is a significant factor. When all facts and circumstances are weighed, often the determination will hinge on a matter of degree and sense of fairness.

1. Types of Actions

Every waiver problem must be judged in a case-by-case basis. In one situation, negotiations with a defaulting Kr may be decisive indication of the Government's intent to continue.

In another, where the Government may have clearly expressed its intent to forbear and not to waive, negotiations may be characterized merely as an effort to explore the possibility of continuing with performance. The determination usually rests on whether the

Government's acts are non-affirmative in nature, indicating forbearance or affirmative, manifesting an election to have performance continual.

(a) Non-Affirmative Acts --

Non-affirmative acts, in essence, are acts which aid the Government in its deliberations as to the course of action to be taken. For instance, "show cause" letters requesting the Kr to inform the Government if it has experienced excusable delays, or conferences with him to ascertain the present status of performance and his plans regarding completion, or demonstrations and courtesy inspections, the purpose of which are to inform the Government of his progress, are all investigatory in nature and generally will not indicate an intent to continue performance. Allied Paint Mfg. Co., Inc. GSBCA No. 1488, 67-1 BCA PP 6387. Rather, such non-affirmative acts will be regarded as an aid to the Government in reaching a decision and will be deemed as evidence of an intent to forbear.

(b) Affirmative Acts --

If the Government acts affirmatively indicating that it intends to have the contractor continue performance, the period of forbearance terminates. Whether particular Government acts are affirmative will depend on the facts of each case. However, the following are examples of cases where the Government has been held to have affirmatively waived delivery date:

(i) directing by formal change order to ship items by one rail rather than by rail or truck as K provided, Goslin Birmingham, Inc., Eng BCA No. 2800, 67 BCA-2, PP 6402;

(ii) Recommending inspection after the passing of of the delivery date, Legion Utensils Co., Inc., GSBCA No. 2732, 69-1 BCA PP 7745; and

(iii) Repeated acceptance of late deliveries, Lowell Monument Co., VACB No. 1111, 75-1 BCA PP 11, 341.

In each case the act in question was not merely investigatory to aid the Government in deciding w/n to default -- it was a manifestation that the Government intended for the Kr to continue performance.

Second Essential Element: Contractor Reliance on Government's Waiver
DeVito v. U.S. 188 Ct. Cl. 979, 413 F 2d 1147 (1969)

If Kr fails to continue with performance after passage of the due date and incurs no substantial expenses, the waiver defense will fail because the Kr has not shown reliance, Cuyahagan Painting & Sheeting Co., GSBCA No. 3693, 74-1 BCA PP 10, 374.